IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 492 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PALABHAI JETHABHAI MAKWANA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 492 of 2002

MR GC RAY for Petitioner No. 1

MR PK PARMAR for Petitioner No. 1

MR SJ DAVE, APP for Respondent No. 1

MS SADHANA SAGAR for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 06/03/2003

ORAL JUDGEMENT

This is a revision application filed by the

petitioner above named under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to challenge an order dated 28/11/02 recorded by the learned Additional Sessions Judge, Court No. 10, City Sessions Court, Ahmedabad in Sessions Case No. 233 of 2001 arising from Naranpura Police Station, I C.R. No. 238 of 2001 under which the learned trial Judge allowed an application of the prosecution and directed that the present petitioner be joined as a co-accused under Section 319 of the said Code.

2. Feeling aggrieved by the said order of the trial court the petitioner has preferred this revision application before this Court. In fact other accused persons were tried before the aforesaid court for offences punishable under Section 302, 498(A) read with Section 114 IPC and in the alternative for an offence punishable under Section 306 and 498(A) IPC read with Section 114 IPC. Charge was framed and evidence was recorded. During the course of evidence, it was noticed that the present petitioner was also involved in the said offence. Therefore, an application was submitted and after hearing, it was granted and the present petitioner was ordered to be added as a co-accused. The learned advocate for the petitioner has argued before this Court that there was no material before the trial court for joining the present petitioner as a co-accused. That, therefore, the trial court ought not to have exercised jurisdiction vested in the said Court, by invoking Section 319 of the said Code.

3. On going through the records, it is found that the name of the petitioner has not come on record for the first time during the course of the evidence of witnesses. It is a matter on record that one Ashwinaben, aged about 10 years, had given a statement to the investigating Police Officer on 06/07/01 that she was the daughter of deceased - Kantaben. That on the date of the offence, the deceased mother had distributed mangoes to the young children in their locality. That, thereafter, the present petitioner had given dirty abuses to the deceased. That, thereafter at night hours along with other persons the present petitioner had also beaten the deceased mother and thereafter, she was hung. It is, further stated that some medicine was admitted to her. So, the involvement of the petitioner was disclosed right from the stage of the investigation, at least during the statement of this witness.

4. It is, then required to be considered that the

name of this witness was included as a witness in the chargesheet also. There is no dispute that the copy of the chargesheet was supplied to the accused persons who were named in column 1 of the said chargesheet. Therefore, it cannot be said that this case has been fabricated for involving the present petitioner for the first time, after the filing of chargesheet.

5. It is true, that the original informant had filed special Criminal Application No. 451 of 2001 for adding the present petitioner as a co-accused. The learned trial Judge has recorded that since the chargesheet was filed and the case was committed to the court of Sessions and since the charge had already been framed against the remaining accused persons, this Court had directed that this issue may be dealt with and decided by the trial court.

6. It is apparent that under Section 319 of the said Code a person cannot be added as an accused unless evidence is recorded. In other words, a person cannot be added as an accused person without recording any evidence. Therefore, it was necessary for the trial court to record evidence. Therefore, the evidence was recorded by the trial court and during the course of evidence, the said daughter - Ashwinaben was examined and after examining her, the trial court has passed the above order.

7. Even during the course of evidence before the trial court, Ashwinaben has stated on oath before the trial court that the present petitioner had given indecent abuses to the deceased mother on the morning of the said event. Even at the time of the commission of the alleged offence, the presence of the petitioner has been disclosed by her during the course of her evidence.

8. The learned advocate for the petitioner has stated that the witness has stated in the evidence that the present petitioner had admitted some medicine to the deceased. But the F.S.L. report does not show that some poison was detected from the body of the deceased. We may not require at this stage to appreciate the evidence on record by finding out contradictions or contradictory evidence on record. Then, it is also required to be seen that an offence punishable under Section 302 IPC is not the only offence which is being faced by the accused persons. There is also the charge of offences punishable under Section 498(A) and 306 IPC as an alternative charge. Therefore, even if the involvement of the present petitioner may not be sufficient for proving an

offence punishable under Section 302 IPC, his involvement for other two offences can be considered appropriately by the trial court, in view of the fact that Ashwinaben has also deposed before the trial court that the present petitioner had given indecent abuses to the deceased mother. It is required to be considered that deceased herself had given a complaint/application to the PSI of Women Police Station, Karanj on 28/04/99 and according to the learned advocate for the original informant, the deceased had given detailed account about the part played by the petitioner. However, learned advocate for the petitioner states that this document is not a part and parcel of the chargesheet and therefore this Court may not look into it. If the said document is not a part and parcel of the chargesheet, then it may not be possible for this Court to look into the said document.

10. Even if we do not look into the said document, the fact remains that the involvement of the petitioner has been disclosed during the course of evidence of the witness and the witness has already stated so, before the submission of chargesshet and at the stage of investigation also.

11. Mr.G C Ray, learned advocate for the petitioner has argued that though the event took place long back, the statement of the witness was recorded late after about a month. Delay in recording of statement of witness can be appropriately considered at the stage of trial. This is not a stage at which we may be required to appreciate the evidence and when the evidence is not required to be appreciated, this delay in recording statement cannot be considered from that angle.

12. It has also been argued by Mr. Ray that though there is a power under Section 319 with a court to add any person as a co-accused, the trend of the courts is that such power should be exercised very sparingly. It is not necessary to disagree that the said principle is enunciated in so many cases. However, in the present case we find that the involvement of the petitioner was disclosed right from the beginning, before the chargesheet was filed and yet the investigating Police Officer did not find it proper to include the present petitioner as a co-accused. Once the case was committed to the court of Sessions, the said court had no other alternative, but to record evidence before considering an application for joining the petitioner as co-accused since Section 319 of the said Code puts an obligation on the court to record evidence before any person can be joined as a co-accused.

13. It has also been argued that the deceased had not died on account of any poisonous drug. Therefore, the petitioner cannot be said to have committed the murder of the deceased. As said above, the offence of murder is not the only charge which is being faced by the accused. Other offences are punishable under Section 498(A), 306 IPC only. So, even if the petitioner may not have committed an offence punishable under Section 302 IPC, his involvement for the remaining offences will have to be considered by the trial court.

14. It has also been stated during the course of the argument that witness Ashwinaben is aged about 10 years and she was staying with her grandfather and she may be tutored for rendering an evidence of this nature. Whether the witness has actually been tutored or not, will again be a question to be dealt with and decided by the court, after appreciating evidence of the witness in light of other evidence on record.

15. It has also been argued by him that the present petitioner has been staying at a distant place and his residence is at a distance of not less than 10 KMs. Therefore, there was no likelihood for the witness to come to the spot at 9 P.M., when he is not on good terms with the family. The circumstances under which the petitioner had arrived at the spot would again be required to be dealt with and decided by the trial court when the appreciation of evidence takes place. At the same time, it is required to be considered that his involvement has been prima facie established during the stage of investigation and during the course of the evidence, recorded before the trial court. In above view of the matter, it may not be said that the trial court has committed illegality in joining the present petitioner as a co-accused.

16. After all the present proceeding is a criminal revision, wherein the powers of the court are very limited. This Court can interfere with an order of the trial court only when it is found that the order is ex-facie illegal. In the present case, we find that the order of the trial court which is impugned in this revision application, is based on some evidence on record. At this stage, it is not possible for this Court to enter into an area as to whether or not the evidence produced is sufficient. Sufficiency of evidence can be gone into only at the stage of trial and not at this intermediate stage. In that view of the matter, there is no substance in the present application. Therefore, the

revision application deserves to be dismissed.

17. For the foregoing reasons, this revision application is ordered to be dismissed. Rule is discharged. Interim relief stands vacated.

At this stage, the learned advocate for the petitioner states that some time may be granted to the petitioner to approach the higher forum for agitating his grievance before the said Court. In that view of the matter, the trial court will not proceed with the trial of the petitioner, till 06/04/2003 and the petitioner shall not be arrested till that date, on condition that he will appear before the trial court on 07/04/2003. Direct service permitted.

(D. P. Buch, J.)
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